Lotus Suites, Inc., d/b/a Embassy Suites Resort *and* International Longshoremen's and Warehousemen's Union, Local 142, AFL–CIO. Cases 37–CA–2742 and 37–RC–2964

December 16, 1992

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 18, 1991, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party Union filed cross-exceptions and supporting briefs. The Respondent thereafter filed an answering brief to the General Counsel's and the Charging Party's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that the Respondent, through its supervisors, Todd Teske and Rana Linmark, violated Section 8(a)(1) by threatening employees, just before the election, that a wage increase would not be granted if they voted for the Union. The judge denied the Respondent's motion to dismiss the complaint. In that motion, the Respondent, citing *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), contended that there was an insufficient factual connection between the charge and the complaint allegations on which the violation is based. In its exceptions the Respondent renews its motion to dismiss the complaint. We find, although for reasons different from those of the judge, that the underlying charge is sufficient to support the complaint allegations, and we further find, for reasons set forth by the judge, that the threats of Supervisors Teske and Linmark violated Section 8(a)(1).[2]

The charge filed by the Union alleged that the Respondent violated Section 8(a)(1) and (3) of the Act. The preprinted unfair labor practice charge form contains a space for detailing the ''Basis of the Charge.'' In that space, the Union typed in the following language:

> Within the last six months, and thereafter, the above-named Employer, in order to discourage membership in a labor organization, discriminated in regard to the hire and tenure of employment and to the terms and conditions of employment of its full-time and regular part-time employees.
>
> Within the last six months, and thereafter, the above-named Employer, by the above and other acts, interfered with, restrained, and coerced its employees in the exercise of their rights as guaranteed by Section 7 of the Act.

The complaint that issued alleged a number of specific 8(a)(1) violations by the Respondent, including the creation of the impression that employees' union activities were under surveillance, threatening to withhold a wage increase and to reduce employee amenities if the Union won an upcoming representation election, and granting a wage increase after the elec-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has moved for a new hearing, contending that the judge erroneously quashed its subpoena of Union Representative Gabe Aio, whose testimony regarding the exact salary paid by the Union to Rebecca Covert as a union employee during the time she was also employed by the Respondent purportedly would have established that she was a biased witness. We deny the motion. Although without Aio's testimony the judge did not know the amount of compensation Covert received from the Union, he did know, in making his credibility determinations, that Covert was a part-time paid employee of the Union while employed by the Respondent and that she claimed that she did not know the amount of compensation she received from the Union. Under these circumstances, we do not find the judge's quashing of Aio's subpoena to constitute an abuse of his discretion or to constitute adequate basis for reversing his credibility findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

Finally, the Respondent moves to strike the General Counsel's cross-exceptions for failing to designate by precise page and exhibit citation the portion of the record relied on in support of its cross-exceptions, as required by Sec. 102.46(b) of the Board's Rules and Regulations. We deny this motion because the General Counsel's cross-exceptions, although not conforming in all particulars with Sec. 102.46(b), are not so deficient as to warrant their rejection. *Monarch Machine Tool Co.*, 227 NLRB 1265 fn. 2 (1977).

[2] Even if the charge did not support the complaint, the conduct would be objectionable. We therefore affirm the judge in this regard. However, in doing so, we disavow the judge's statement set forth in his discussion of Objection III, that Supervisor Linmark's threat was an ''isolated unauthorized utterance.'' We note that it was made in the presence of approximately 20 employees. Further, in light of the testimony of employee Rebecca Covert that she did not mention Teske's unlawful threat to her to any employees, we find unwarranted the judge's characterization of the threat as ''the type of remark which would likely be passed around within the work force.'' However, in the context of Linmark's threat, we find it to be objectionable. We also find unwarranted the judge's interpretation that the language used by the Respondent in its newspaper advertisement to recruit employees intimated the Respondent's desire to operate without rank-and-file employees having union representation.

tion. The complaint did not allege any violation of Section 8(a)(3).

Identification of the issue presented in this case is of critical importance to its resolution. The issue here is whether a charge which alleges a violation of Section 8(a)(1) of the Act, using general statutory language, is legally sufficient to support a complaint alleging particularized violations of Section 8(a)(1). The issue here is not whether the preprinted language at the bottom of the charge form can support a complaint.[3] The Board's decision in *Nickles Bakery* answers that question in the negative.[4] However, that case did not address the issue in the instant case.[5]

The starting point for our analysis must be the Act. Section 10(a) provides that ''[t]he Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.'' Section 10(b) provides that ''[w]henever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . . .''

Section 10(b) thus mandates only that a charge be filed before a complaint issues. Congress chose to prevent the Board from initiating complaints on its own motion. *NLRB v. Kohler Co.*, 220 F.2d 3 (7th Cir. 1955); *Consumers Power Co. v. NLRB*, 113 F.2d 38 (6th Cir. 1940). Section 10(b) does not require that the charge be specific nor that the charge and the subsequent complaint be identical. As the Supreme Court stated almost 50 years ago, ''[t]he charge is not proof. It merely sets in motion the machinery of an inquiry. When a Board complaint issues, the question is only the truth of its accusations. The charge does not even serve the purpose of a pleading.'' *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 18 (1943).

Based on these principles, the Board has long held that a charge alleging a violation of Section 8(a)(1) in general terms is sufficient to support a complaint alleging a particularized violation of Section 8(a)(1). *Brookville Glove Co.*, 116 NLRB 1282 (1956).[6] See also *Columbia University*, 250 NLRB 1220 fn. 2 (1980).

We find instructive the Supreme Court's decision in *NLRB v. Fant Milling Co.*[7] The charge in that case alleged a general 8(a)(5) violation, i.e., it recited the broad language of that provision's statutory language. As relevant, the complaint that issued alleged, inter alia, particularized 8(a)(5) conduct, i.e., granting a unilateral wage increase some 4 months after the charge was filed. The Court held that the charge was sufficient to support the complaint, noting that:

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. . . . The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. The Board was created not to adjudicate private controversies but to advance the public interest in eliminating obstructions to interstate commerce . . . .
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order to properly discharge the duty of protecting public rights which Congress had imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge. [360 U.S. 307–308. Citations omitted.]

The Court also noted that in *National Licorice Co. v. NLRB*[8] it had held that the Act did not preclude the Board from finding unfair labor practices alleged in a complaint, even if they were not specified in a charge, so long as the complaint allegations are ''related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.'' Notwithstanding the general language of the charge, the Court in *Fant Milling* concluded that the

[3] The preprinted language states ''[b]y the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.''

[4] In *Nickles Bakery* the Board reversed precedent and held that it will no longer rely on the boilerplate ''other acts'' language preprinted on unfair labor practice charge forms as procedurally sufficient support for particularized 8(a)(1) complaint allegations. Instead, there must be a showing of factual relatedness between the charge allegations and the 8(a)(1) allegations in the complaint. To determine whether such a showing has been made the Board stated that it would apply the ''closely related'' test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988), which requires: (1) that the charge and the complaint allegations involve the same legal theory; (2) that they arise from the same factual circumstances and (3) that the respondent would raise the same or similar defenses to the allegations in the charge and in the complaint. Applying these principles to the instant case the judge found that each prong of the *Redd-I* test was fulfilled and that the charge was adequate to support the complaint.

[5] Thus, we disagree with the fundamental basis of our colleague's dissent.

[6] In *Brookville* the charge alleged a violation of Sec. 8(a)(1), but the section of the charge entitled ''Basis of the Charge'' was left blank by the charging party. The complaint alleged that the respondent violated Sec. 8(a)(1) by discharging and refusing to reinstate two employees because they refused to abandon an economic strike.

[7] 360 U.S. 301 (1959).

[8] 309 U.S. 350 (1940)

unilateral wage increase allegation of the complaint, being ''of the same class of violations as those set up in the charge,'' was sufficiently related to the charge and was properly considered by the Board.[9]

Based on the above, we find that the generalized statutory language used in the charge filed in this case was sufficient to initiate an investigation of unfair labor practices by the General Counsel, and that the charge is legally sufficient to support the 8(a)(1) complaint allegations regarding the Respondent's threats to withhold wage increases. The charge broadly alleged 8(a)(1) violations. The complaint specifically alleged 8(a)(1) violations. Thus, the complaint allegations were ''of the same class of violations as those set forth in the charge.''

We find our dissenting colleague's basis for distinguishing *Fant Milling* unfounded and unpersuasive. The charge in that case was not specific. Rather, it alleged the broad statutory language of Section 8(a)(5). The charge was sufficient to support a complaint allegation of a specific type of 8(a)(5) violation, viz a unilateral change. In our view, if a broad 8(a)(5) charge can support a specific 8(a)(5) complaint allegation, then a broad 8(a)(1) charge can support a specific 8(a)(1) complaint allegation.

We recognize that the sole difference between this case and *Nickles Bakery* is that, in this case, the broad language has been typed by the Union in the body of the charge form in addition to having been preprinted by the Board on the bottom of it. However, the distinction is a significant one. Where, as here, the charging party types in the broad language, that party is asking the Agency to conduct a broad investigation of 8(a)(1) allegations. Hence, when the Agency does so, it is not acting sua sponte. However, where the charging party does not type in that language, that party is not seeking a broad inquiry. The only basis for a broad inquiry is the preprinted language on the form. But that language is *the Agency's language*, not the charging party's language. Hence, if the Agency conducted a broad inquiry, it would be acting sua sponte. As discussed supra, the Agency is not permitted to act sua sponte.

We further recognize that our finding herein does not squarely comport with the requirement of Section 102.12(d) of the Board's Rules and Regulations that the charge shall contain ''[a] clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce'' nor with the charge form itself which provides with respect to the basis of the charge that the charging party ''be specific as to facts, names, addresses, plants involved, dates, places, etc.'' These requirements, however, are merely '''for the information of the Board' to aid it in conducting its investigation,''[10] and cannot serve to engraft onto the Act procedural hurdles that the Act does not contemplate or require.[11]

Accordingly, we deny the Respondent's motion to dismiss the complaint.

2. The judge overruled the Union's Objections IV and X and found that the Respondent's creation of a ''Kokua Council,'' subsequently renamed ''Employee Council,'' during the critical period of the election proceeding did not constitute objectionable conduct. The Union excepts, contending that the Council was improperly established as a vehicle for, among other things, soliciting employee grievances and promising benefits or improvements, thereby interfering with the employees' right freely to choose their bargaining representative. We find merit in this exception.

During the week of December 5, 1988, in preparation for the partial opening of its new luxury resort hotel on the island of Maui, Hawaii, the Respondent conducted a series of orientation meetings with groups of newly hired employees. A prominent feature of these meetings was the Respondent's distribution of a draft employee handbook which generally set forth the proposed ''policies, benefits, and standards of conduct'' for the hotel. At issue here is the ''problem solving'' provision of the handbook draft which reads, in its entirety, as follows:

> PROBLEM SOLVING
>
> When people work together, sometimes problems and misunderstandings can arise. To help solve any problems *we* may encounter, we encourage *open communication*. We will protect your rights to discuss any job problems without fear of reprisals. Problems relating to our personnel policies and procedures can and should be settled as soon as they arise.
>
> *Steps for Solving Our Problems*:

[9] *Fant Milling*, supra at 307 and 309, quoting *National Licorice Co. v. NLRB*. Accord: *Kansas Milling Co. v. NLRB*, 185 F.2d 413, 415 (10th Cir. 1950). (''A charge in the general language of the statute is sufficient if it challenges the attention of the Board and leads to an inquiry under the provision of the Act.'')

[10] See *Cromwell Printery Inc.*, 172 NLRB 1817, 1821–1822 (1968).

[11] Contrary to the suggestion of the dissent, we would not countenance a charge in which the charging party says that he has no knowledge of any unlawful acts by a respondent but wants the General Counsel to investigate to see if, perhaps, the respondent may have committed such an act. In the instant case, the Charging Party affirmatively alleges that the Respondent committed 8(a)(1) violations.

Similarly, contrary to the suggestion of the dissent, we do not give the General Counsel ''carte blanche'' to expand or ignore the charge. If, for example, the charge alleges an 8(a)(5) unilateral change, this would not give the General Counsel ''carte blanche'' authority to allege an unrelated independent 8(a)(1) violation. In the instant case, the charge alleges 8(a)(1) violations and the complaint alleges 8(a)(1) violations.

> Step 1: Bring the problem to the attention of your immediate supervisor. Your supervisor will listen to the problem and make every effort to solve it. If you are not satisfied with the result within three days, you should go to Step 2.
>
> Step 2: Discuss the problem with your Department Head. If the problem cannot be resolved with this step, you should go to Step 3.
>
> Step 3: *Our Council of Kokua*: We have a group of respected leaders to whom unsolved problems should be presented. If they can't resolve it, go to Step 4.
>
> Step 4: The General Manager will review any matters not satisfactorily resolved by the Council.
>
> If you feel you are experiencing any form of discrimination or retaliation for raising an issue or problem, *please express* your concern to your supervisor or, if you feel more comfortable, please talk it *over with* the General Manager.
>
> We encourage you to share with our staff any problems and concerns so that we may help you solve them. Furthermore, this problem-solving procedure has been established so that it can be used freely and without fear of punishment of any kind.

Attached to each copy of the handbook draft was a memorandum requesting the employees to ''help in reviewing and improving'' the handbook and to notify their supervisor if they had ''anything to contribute.'' According to the memorandum ''[t]his will enable us to complete the new Handbook by the first week of January,'' but pending issuance of the final handbook, the draft ''guidelines are currently in effect and each and everyone of us is expected to comply, even during this review period.''

The handbook, however, was not finalized until 2 days before the election on April 19, 1989,[12] when it was distributed to all employees at a mandatory employee meeting. At this time the Respondent also distributed a memorandum entitled ''The Employee Council.''[13] The memorandum listed the following seven ''responsibilities of the Council'':

> 1. *Representation*: On Page 28 of our employee handbook, the Council serves as a center for employee appeals and in solving problems.
>
> 2. *Communications*: The Council will publish a monthly hotel newsletter.
>
> 3. The Council will plan all employee and family functions.
>
> 4. The Council will review new ideas submitted by our employees and submit recommendations to specific department heads and managers.
>
> 5. The Council will submit recommendations and suggestions for improvement to the General Manager.
>
> 6. The General Manager has the option of presenting any hotel policy or procedures changes to the Council, to get initial feedback and subsequent input.
>
> 7. The Council is dedicated to improving the human relationships in this hotel:
>
> Employee to Employee
> Manager to Manager
> Employee to Manager

The judge found that the Kokua Council was ''completely an instance of start-up management prerogatives'' and was not an objectionable vehicle for soliciting employee grievances. We disagree.

It is well established that when an employer, as here, institutes a new practice of soliciting employee grievances during a union organizational campaign, ''there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.''[14] The evidence shows that, by the device of the Kokua Council, the Respondent sought to solicit and remedy employee grievances. This was made explicit by the statements in the April 19 memorandum that the Council ''serves as a center for employee appeals and in solving problems,'' that the Council ''will review new ideas submitted by our employees and submit recommendations to specific department heads and managers,'' and that the Council ''will submit recommendations and suggestions for improvement to the General Manager.''

In view of the foregoing circumstances, including the timing of the Respondent's conduct during the critical period of the election proceeding, we find that the Respondent interfered with the employees' Section 7 right freely to choose their bargaining representative. *Stride Rite Corp.*, 228 NLRB 224 (1977).[15] In light of this finding, and our adoption of the judge's recommendation to sustain the Union's Objection 1, we

[12] All dates are in 1989 unless otherwise indicated.

[13] The ''Problem Solving'' section of the handbook's final edition was virtually unchanged from the draft version. However, contrary to initial indications that employees would elect members to the Council, the Respondent announced in its April 19 memorandum the appointment of a 15-member Council, four of whom were management personnel.

[14] *Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

[15] The General Counsel did not allege the establishment or existence of the Kokua Council as a violation of the Act, and we thus do not reach that issue. Nor do we decide whether, absent timing, the establishment or existence of the Kokua Council would constitute objectionable conduct.

conclude that the Respondent's conduct warrants setting aside the election.[16]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lotus Suites, Inc., d/b/a Embassy Suites Resort, Maui, Hawaii, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election in Case 37–RC–2964 is set aside and the case is remanded to the Regional Director for Region 20 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative, as directed below.

[Direction of Second Election omitted from publication.]

CHAIRMAN STEPHENS, dissenting in part.

I agree with my colleagues that the Respondent has engaged in objectionable conduct sufficient to direct a new election. However, contrary to my colleagues, I would grant the Respondent's motion to dismiss the complaint, concluding that, consistent with *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), it is barred by Section 10(b) because it derives absolutely no factual support from the unfair labor practice charge filed by the Union. The majority's view of this issue—permitting literally any 8(a)(1) complaint allegation to arise from boilerplate ''other acts'' charge language—conflicts with Board law, Supreme Court precedent, and this Agency's institutional practice.

I have attached to this opinion the unfair labor practice charge at issue. Reviewing the large boxed area in the center of the charge form, headed ''Basis of the Charge,'' I note preliminarily that the allegations of the first typewritten paragraph, asserting unlawful discrimination under Section 8(a)(3), did not result in any 8(a)(3) allegation in the complaint, and there is no indication of a connection between that charge of discrimination and the alleged unfair labor practices which ultimately appeared in the complaint. It is the second typewritten paragraph which is the focus of my attention and that of my colleagues. It states:

> Within the last six months, and thereafter, the above-named Employer, by the above and other acts, interfered with, restrained, and coerced its employees in the exercise of their rights as guaranteed by Section 7 of the Act.

This paragraph is virtually a repetition of the boilerplate ''other acts'' language preprinted at the bottom of this section of the charge form, and it does not allege any facts. From this typewritten paragraph, consisting of no more than boilerplate legal conclusions describing an 8(a)(1) violation, the General Counsel generated six distinct, factually specific complaint allegations that the Respondent violated Section 8(a)(1).

At the beginning of the ''Basis of the Charge'' section, the charging party is instructed, in preprinted parenthetical language, to ''be specific as to facts . . . etc.'' This factual-specificity requirement is also set forth in the Board's Rules and Regulations, Section 102.12(d), stating that the charge shall contain a ''clear and concise statement of the facts constituting the alleged unfair labor practices,'' and in the General Counsel's NLRB Casehandling Manual (Part One) Unfair Labor Practice, section 10020.1, which states that ''the facts alleged in a charge to constitute the unfair labor practices should be set forth with some specificity but should not contain detailed evidentiary matter.'' I am not contending here that these statements in the charge form itself, in the Rules and Regulations, and in the Casehandling Manual establish a legally binding requirement of factual specificity in the charge. I will address the law below. I merely point out that these statements reflect that, as a matter of institutional wisdom and experience, this Agency routinely requires at least some factual specificity in an unfair labor practice charge. This sensibly reflects the policy of Section 10(b), which effectively bars the General Counsel's office from initiating unfair labor practice proceedings on its own.

The applicable law with respect to the validity of the complaint in this case under Section 10(b) is *Nickles Bakery of Indiana*, supra. In *Nickles*, the Board, adopting the view of the D.C. Circuit in *G. W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988), overruled prior case law which permitted the General Counsel to draw factually specific complaint allegations solely from the preprinted ''other acts'' language of the charge. In doing so, the Board established that the ''closely-related'' test of *Redd-I, Inc*., 290 NLRB 1115 (1988), would be applied to determine whether complaints alleging 8(a)(1) violations are sufficiently supported by the factual content of the unfair labor practice charge. The essential theory of *Nickles* is that under Section 10(b), the Agency cannot institute unfair labor practice proceedings on its own; therefore there must be some factual nexus between the charge's allegations and the 8(a)(1) complaint allegations for the complaint to be valid. A fortiori, when the charge contains no factual allegations at all, as in the instant case, there can be no nexus and a complaint cannot properly issue.

[16] Accordingly, we find it unnecessary to pass on the judge's recommendation to sustain the Union's Objection III.

In the absence of exceptions, we adopt, pro forma, the judge's recommendation to overrule the Union's Objection II.

My colleagues attempt to avoid confronting the case law by pointing out that in *Nickles* the ''other acts'' language was preprinted, although here the Charging Party has typed it on the charge form. Thus, they reason that although the General Counsel may not conduct a broad unfair labor practice investigation sua sponte, i.e., based on preprinted boilerplate charge language, a charging party, by consciously intoning the same boilerplate language, may legitimately give the General Counsel the carte blanche that the statute itself withholds. This is unconvincing. We would surely not find that the General Counsel had warrant for an investigation in a charge stating that the charging party had no knowledge of anything in particular done by the employer but wanted the General Counsel to investigate to see if any coercive act within the last 6 months might be turned up. I cannot see that the charge filed here is, in principle, different. In the absence of any factual connection between the complaint allegations and the charge, my colleagues' conclusion that the charge supports the complaint in this case appears to me effectively to overrule both *Nickles* and *Redd-I.*

NLRB v. Fant Milling Co., 360 U.S. 301 (1959), on which my colleagues primarily rely, is distinguishable. First, the issue decided by the Court was whether, under Section 10(b), allegedly unlawful conduct occurring after the alleged misconduct described in the charge may be included in the complaint allegations. The Court did not address—by implication, dicta, or otherwise—the issue posed in this case: whether a charge consisting of boilerplate 8(a)(1) legal conclusions and no factual allegations provides any lawful basis under Section 10(b) for the particularized 8(a)(1) allegations in the complaint. Second, the matters before the Court involved Section 8(a)(5). Allegations implicating the refusal-to-bargain concepts of Section 8(a)((5) are inherently narrower in their factual scope than potential violations of Section 8(a)(1). In other words, the boilerplate 8(a)(1) legal conclusions set forth in this charge implicate every conceivable unfair labor practice an employer may commit under Section 8 of the Act. Nothing asserted in a charge could be more broad, uninformative, and all-enveloping than this.

Finally, far from providing a basis for my colleagues to overrule *Nickles, Fant Milling* is in fact consistent with what was decided in that case, see 296 NLRB at 927. The Court's references to ''the specific matters alleged in the charge'' and ''precise particularizations of a charge,'' 360 U.S. at 307–308, reflect an acknowledgement of the need for some factual specificity in the charge. It is this requirement of specificity that the majority here rejects in favor of universal, ''one-size-fits-all'' charge allegations.

The Supreme Court in *Fant Milling* warned against allowing the General Counsel ''carte blanche'' to expand or ignore altogether the unfair labor practice charge in issuing complaint. 360 U.S. 309. My colleagues, however, would permit the General Counsel precisely such an unrestrained exercise of authority. Because, for the reasons stated above, I find the majority's view inconsistent with the limits placed by Section 10(b) on the General Counsel's authority to originate an unfair labor practice case, I respectfully dissent.

Lewis S. Harris, Esq., for the General Counsel.
Jared H. Jossem, Esq. (Torkildson, Katz, Jossem Fonseca, Jaffe & Moore), of Honolulu, Hawaii, for the Respondent.
Danny J. Vasconcellos, Esq. (Herbert R. Takahashi), of Honolulu, Hawaii, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This consolidated case was heard at Kahului, Maui, Hawaii, and Honolulu, Oahu, Hawaii, over a course of 4 trial days comprising March 29–31, 1990, inclusive, and April 2, 1990. The charge in Case 37–CA–2742 was filed August 11, 1989, by ILWU Local 142, AFL–CIO (the Charging Party or Local 142). Pursuant to this charge a complaint was issued September 29, 1989, concurrent with an order consolidating cases which embodied a request that the associated representation proceeding, Case 37–RC–2964, be referred to the Board for ultimate disposition. The primary issues in the complaint case are whether Lotus Suites, Inc., d/b/a Embassy Suites Resort (the Respondent), unlawfully (a) implied that the Charging Party was preventing Respondent from granting a pay raise, (b) created an impression, and implied, that union activities of its employees were under surveillance, (c) threatened to reduce employee amenities if Local 142 were to win a representation election, (d) impliedly promised a pay raise contingent on the election, and (e) instituted a postelection wage increase and bonus in order to discourage support for Local 142, in violation of Section 8(a)(1) of the National Labor Relations Act.

In the representation case a petition was filed December 6, 1988, by Local 142 (in this regard the Petitioner or the Union). It also involved Lotus Suites, Inc., d/b/a Embassy Suites Resort (in this regard the Employer). Pursuant to this petition, and a Decision and Direction of Election issued March 22, 1989, a secret-ballot election was conducted on April 21, 1989. Of approximately 336 eligible employee voters, 61 votes were cast for Petitioner and 154 were cast against. The 11 challenged ballots resulting from this election were not sufficient in number to affect its results. Petitioner then filed 11 timely objections, each one separately headed and identified by serial Roman numerals. However, on May 26, 1989, Petitioner withdrew its Objections VI, VII, VIII, IX, and XI. Following investigation the Regional Director issued a Supplemental Decision on May 30, 1989, in which he deemed that substantial and material issues of fact existed concerning objections not withdrawn, and those remaining

could best be resolved through a hearing. These remaining unwithdrawn objections comprised the following:

I.

UNLAWFUL THREATS AND INTERFERENCE

Commencing December 6, 1988 and thereafter, Lotus Suites, Inc. d/b/a Embassy Suites Resort (hereinafter ''HOTEL,'' ''EMPLOYER,'' or ''EMBASSY SUITES''), by and through its employees, representatives, and agents unlawfully threatened, coerced, and interfered with the rights of employees under Section 7 of the Act by threatening loss or reduction of wages, hours of work, and other conditions of employment, if they voted for the union or if the union won representational rights.

II.

UNLAWFUL PROMISE OF WAGES, BENEFITS, AND IMPROVED WORKING CONDITIONS AND IMPROPER WITHHOLDING OF SAME

Commencing December 6, 1988 and thereafter, the Employer, by and through its employees, representatives, and agents unlawfully promised improvements or increases in wages, hours of work, and other conditions of employment, if they voted *against* [as corrected] the union or if the union *lost* [as corrected] representational rights. The employer also unlawfully and improperly withheld such improvements and increases (after promising them) in order to interfer with the rights of employees under the Act.

III.

UNLAWFUL AND UNTIMELY GRANTS OR IMPROVEMENTS IN WAGES, BENEFITS, HOURS OF WORK AND OTHER CONDITIONS OF EMPLOYMENT

Commencing December 6, 1988 and thereafter, the employer, by and through its representatives, employees and agents, unlawfully granted increases and improvements in wages, benefits, hours of work and other conditions of employment during the ''critical period'' prior to the election to improperly affect the outcome of the election and thereby interfered with the rights of employees under section 7 of the Act.

IV.

UNLAWFUL APPOINTMENT OF KOKUA COUNCIL, AND PROMISES OF IMPROVEMENTS AND BENEFITS

Commencing on December 6, 1988 and thereafter, the Employer by and through its representatives, employees, and agents established a Kokua Council, appointed certain persons as members, and unlawfully promised improvements to employees if they would act through the employer designated representatives instead of voting for the union or having a union serve in a representational capacity. The employer offered appointments to certain members to win then [sic] over from the union and offered them various inducements and special dispensations for serving in the Kokua Council.

V.

UNLAWFUL INTERROGATION, SURVEILLANCE AND IMPRESSION OF SURVEILLANCE

Commencing on December 6, 1988 and thereafter, the Employer, acting by and through its representatives, employees, and agents, questioned employees regarding their union sentiment, about their inclination to vote for or against the union and about union meetings, inquired about attendance by various employees at union meetings, announced that union meetings were cancelled when they were not, improperly interefered [sic] with holding of union meetings, carried other survillance [sic] on members of the union, supporters of the union, sympathizers, and others who associated with well known union supporters or those who attended union meetings, activities, and functions, and gave the impression of surveillance of union activities, and supporters. Said conduct (and other related practices of the employer) violated Section 7 rights of employees under the Act.

X.

UNLAWFUL SOLICITATION OF GRIEVANCES

Commencing on December 6, 1988 and thereafter, the employer by and through its agents, employees and representatives, improperly and unlawfully solicited grievances and complaints from employees, thereby intefering with their rights under Section 7 of the Act.

On the entire record, including my observation of the demeanor of witnesses, and after consideration of a posthearing letter filed by General Counsel, the Petitioner's memorandum, and the Employer's brief, I reach the recommendations set forth immediately following, and make the findings of fact and conclusions of law contained in a latter portion of this decision.

THE REPRESENTATION CASE

I. SETTING

In late 1988 construction was nearing completion on a new luxury resort hotel located at Ka'anapali Beach. This area is situated on the western side of the Island (and county) of Maui, Hawaii.[1] The owner was then Haseko Hawaii Partners (HHP), of which Charles Sweeney was general partner. HHP was the franchisee of a mainland corporation named Embassy Suites, Inc. Under this licensing agreement HHP was permitted to use the trade name ''Embassy Suites Resort'' for the hotel it was constructing. An individual named Mark Szafranski was general manager for the project.

[1] Siting was done along the extensive curve of world renown vacation beach at which several other major destination resorts, and other establishments have long existed. The Employer's formal address was 104 Kaanapali Shores Place, Lahaina, Maui, Hawaii.

At that point in time an entity named Lotus Suites, Inc. also existed, of which Sweeney was founder, president, and chief executive officer. John DeFries occupied a position as assistant to the president of Lotus Suites, Inc. with a responsibility to assist General Manager Szafranski in opening the resort.

After the hotel opened Szafranski gravitated into mainland basing at San Mateo, California, having added responsibility there for Sweeney's various enterprises coupled with periodic visits to Hawaii as a regional manager. DeFries continued in employment with Lotus Suites, Inc., and was its vice president at the time of hearing.

The business arrangements of final construction, preopening, ''soft'' opening on December 15, 1988, and initial months of operation were such that Lotus Suites, Inc. was the management company of record. Around March 1, 1989, the entire property was sold by HHP to Abe International Adventures Corporation of Tokyo, Japan. Lotus Suites continued to manage the operation for the new owner. The Embassy Suites Resort trade name was unaffected by the sale.

In contemplation of having a typical resort hotel work force, the Employer undertook preliminary planning activities, which included training of proposed management personnel in certain themes for extending service to guests. These themes drew on a widely believed nature of the Hawaiian host culture. They translated into a specific objective for employee standards of service. Respondent's assembling management cadre codified this objective in early November 1988 by a one-page statement entitled ''Our Mission.'' Employees were to display distinctively Hawaiian qualities of Ohana, Aloha, and Lokahi. Ohana meant family, Aloha denoted multiple factors of greeting, love, welcome, and farewell, while Lokahi signified balance and integration. The qualities so expressed were rooted in Hawaiian dialect of words taken from the Polynesian language. Additionally, esteemed spiritual advisors were engaged to best inculcate the full extent, and subtle intricacies, of the total objective. The mission statement had been ''co-authored'' during a management retreat conference on the Big Island of Hawaii during the first week of November 1988. Of the total in attendance, 22 people were in training at that time to be actual managers at the resort.

This activity generally coincided with the start of a vigorous recruitment program on the Island of Maui for the comprehensive staff to be needed in a resort hotel operation. The undertaking kicked off with a local job fair on October 15, 1988, as prominently advertised in the community newspaper. This public notice added that thereafter applications would continue to be available at the state employment office on Maui beginning October 17, 1988. Interested persons were encouraged to schedule interview appointments promptly after their applications were completed. Many individuals responded by submitting job applications. Offers of rank-and-file employment began to flow out a few weeks later.[2]

Those persons eventually hired in early December 1988 and subsequently were promptly trained in the mission statement; the format of this activity being intensive orientation of widely gathered employees over December 5, 6, and 7, 1988, followed by small group meetings conducted predominantly by DeFries thereafter for about 2-1/2 months. The extent and sequencing of this small group training was planned and timed to conclude just as the resort would have its grand opening in early March 1989.

By October 1988 construction progress, recruitment notoriety, and general anticipation in the vicinity were such that two labor organizations commenced activity toward their respective agendas of winning representational rights. These twin intentions targeted a typical bargaining unit of all full-time and regular part-time employees except customary exclusions for the industry, as such would predictably materialize through employment of necessary overall staff. Thus, spirited competition in this regard arose between Hotel Employees & Restaurant Employees Local 5, AFL–CIO, and the Union (Local 142), as they each vied for desired status as an exclusive collective-bargaining representative. Both labor organizations fielded a diverse staff of organizers, publicists, and Honolulu based supporting personnel to assist in the process. The Union buttressed its approach as early as August 1988 by engaging Rebecca (Becky) Covert as its part-time employee, while she was working concurrently at the Hyatt Waikoloa resort hotel on the Big Island. Covert soon ended this employment, relocated to the Island of Maui, applied for employment at the Employer along with the large number of job seekers, and was among the first ones hired. She continued on Petitioner's payroll and characterized her responsibilities in this regard, but while on the Employer's premises during her work shift, as being ''available to answer any questions that I might hear from my co-employees.''

This competition between labor organizations had focused on organizing activities during the Employer's principal recruitment phase of mid-October to early December 1988. Specific tactics by the competing unions included distribution of literature, applicant contacts, employer-approved formal presentations to an assembly of newly hired people, and the filing of representation petitions separated in time by only 1 day. Local 5 ultimately withdrew from the competition.

By late 1988 the hotel could and did function with some limitation as to internal facilities, and with heavier than usual seasonal rains affecting restaurant service on occasion. The first guests were accepted in mid-December 1988 as the preholiday startup of operations in the still incomplete establishment. A concurrent progression of facilities completion followed during January and February 1989, closely associated to the training and increasing familiarity of an overall guest service work force. The Union's representation petition was also in process during that time, while a lively network of internal employee commentary existed as to eventual settling out of wage rates, work scheduling and general conditions of employment. On its business side the Employer moved ahead with plans for an official and grand opening in early March 1989. After this grand opening events during the 2-month period that followed comprise many of the operative facts pertaining to this consolidated proceeding.

II. CASE CHRONOLOGY

October 1988—Availability of employment applications announced.

November 1988—Offers of employment made to hourly employees.

[2] DeFries testified that initial ''employment of the staff . . . occurred on December 5th.''

December 5, 1988—Chief employee orientation begun by managers.

December 5, 1988—Petition filed by Local 5.

December 6, 1988—Petition filed by Local 142.

December 6, 1988—Draft employee handbook distributed (Tr. 41).

December 7, 1988—Concluding date of chief employee orientation.

January 1989—Various payroll corrections and adjustments done.

March 1, 1989—Sale of property.

March 5, 1989—Grand opening of hotel.

March 22, 1989—Secret-ballot election directed.

April 11, 1989—Employer's letter to employees regarding pay.

April 18, 1989—Union election bulletin distributed.

April 18, 1989—Final employee handbook distribution begun.

April 19, 1989—Employer's preelection meetings with employees.

April 21, 1989—Secret-ballot election conducted.

May 3, 1989—Pay raise granted (effective May 16), plus bonus.

III. ULTIMATE OBJECTIONS

A. *Evolution of Ultimate Objections*

During the course of hearing, such objections remaining after 5 of the original 11 were withdrawn underwent further narrowing. This process took the form of express withdrawal of content in one case, and in other cases took the form of limiting, clarifying or explaining language contained in various objections. (Tr. 300–306, 692, 698, 704, and 709–711.)

B. *Precise Scope of Ultimate Objections*

On completion of the process, and as constructively summarized before concluding the hearing of Friday, March 30, 1990, the objections were understood to comprise the following:

> I. Commencing December 6, 1988 and thereafter, Lotus Suites, Inc. d/b/a Embassy Suites Resort (hereinafter ''HOTEL,'' ''EMPLOYER,'' or ''EMBASSY SUITES''), by and through its employees, representatives, and agents unlawfully threatened, coerced, and interfered with the rights of employees under Section 7 of the Act by threatening loss or reduction of wages, hours of work, and other conditions of employment, if they voted for the union or if the union won representational rights.
>
> II. Commencing December 6, 1988 and thereafter, the Employer, by and through its employees, representatives, and agents unlawfully promised improvements or increases in wages, hours of work, and other conditions of employment, if they voted against the union or if the union lost representational rights. The employer also unlawfully and improperly withheld such improvements and increases (after promising them) in order to interfere with the rights of employees under the Act.
>
> III. Commencing December 6, 1988 and thereafter, the employer, by and through its representatives, employees and agents, unlawfully granted increases and improvements in wages, benefits, hours of work and other conditions of employment during the ''critical period'' prior to the election to improperly affect the outcome of the election and thereby interfered with the rights of employees under Section 7 of the Act.[3]
>
> IV. Commencing on December 6, 1988 and thereafter, the Employer by and through its representatives, employees, and agents established a Kokua Council, appointed certain persons as members, and unlawfully promised improvements to employees if they would act through the employer designated representatives instead of voting for the union or having a union serve in a representational capacity. The employer offered appointments to certain members to win then [sic] over from the union and offered them various inducements and special dispensations for serving in the Kokua Council.
>
> V. Commencing on December 6, 1988 and thereafter, the Employer, acting by and through its representatives, employees, and agents, questioned employees regarding their union sentiment, about their inclination to vote for or against the union and about union meetings, and gave the impression of surveillance of union activities, and supporters. Said conduct (and other related practices of the employer) violated Section 7 rights of employees under the Act.
>
> X. Commencing on December 6, 1988 and thereafter, the employer by and through its agents, employees and representatives, improperly and unlawfully solicited grievances and complaints from employees, thereby intefering with their rights under Section 7 of the Act.

C. *Evidence Associated to Each Remaining Objection*

1. Introduction

From late 1988 onward the Employer consistently and expressly exhibited a desire to operate without rank-and-file employees having union representation.[4] This was cleverly first intimated in the Maui newspaper advertisements stating that applications for employment would be welcomed from ''people who care and truly feel that they are being cared for.''

> By letters dated November 8, Szafranski supplied ''senior executives'' of each competing union with a ''position statement'' on Embassy Suites Resort letterhead. This document read:
>
> As we join the Maui community, we recognize and respect the historic role of unions in Hawaii and the legal guarantee that employees have the right to vote, *by secret ballot*, on whether they want union representation.
>
> We have adopted the following policy to clarify our position on unions.

[3] The Petitioner does not contend that complimentary dinner meals served to employees in the Maui Rose restaurant on December 22 and 23, 1988, constituted objectionable conduct by the Employer.

[4] All indicated dates that fall during October through December are in 1988; those during January through September are in 1989.

1. We will open the hotel without granting recognition, secretly or openly, to any union.

2. We request all interested unions to give us and our employees at least six (6) months to get started and to get to know each other.

3. We will hire applicants based upon their merit, ability, experience, training, and other job-related qualifications.

4. We believe that employees in the 1980's and 1990's deserve respect, dignity, and a competitive package of compensation and working conditions, whether or not they have union representation.

The Company expects all supervisors and unions to comply with the law in all respects and will oppose, with all legal means available, any attempts to force, threaten, frighten, or otherwise coerce employees into joining or supporting a union or engaging in a strike or refraining from such action. Furthermore, the Company will insist on the protection of all employees' rights provided by law.

If anyone asks an employee to sign a card or paper for a union, we believe they should not do so without first hearing all positions.

Supervisors and other members of management are prohibited from assisting or supporting unionzation [sic] at our company.

The Employer distributed a subsequent memorandum dated February 1 from management to employees on a subject it termed ''understanding unionism.'' This four-page document opened with a stated purpose of informing employees ''about our observations related to the on going [sic] organizing efforts.'' This communication also expressly recounted how the Employer had ''invited both unions'' to speak to employees. The memorandum continued by picturing how this resulted in each union making its own presentation at a midpoint in the chief employee orientation process, during an 18-minute period that had been granted each of them. In a final preelection distribution headed ''DECISION 89,'' the Employer propagandized further. This document lauded a ''union-free'' workplace, assured that the Employer would ''deal fairly'' with employees, and repeatedly urged a vote against Petitioner in the imminent secret-ballot election.

The draft employee handbook had been distributed under a cover memorandum dated December 7 from Szafranski and DeFries. Among its passages were one asking employees for ''help in reviewing and improving'' the handbook, and an invitation to employees with ''anything to contribute'' that they promptly notify supervision. The first approximately 30 pages of this proposed employee handbook generally covered terms and conditions of employment. Specifically as to holidays, nine were listed as a ''company-paid'' benefit to those qualified. Beyond typical major holidays, the list included King Kamehameha Day and the employee's birthday. The concluding approximately 30 pages followed the heading ''Problem Solving,'' and began with a rudimentary four-step procedure applicable to ''problems.'' After initial and once-reviewed consideration, a step 3 ''Council of Kokua (cooperation),'' made up of ''respected leaders,'' was available for the presentation of ''unsolved problems.'' Absent resolution there a final step 4 element concluded this proposed procedure by tersely stating that the resort's general manager would review any matters not satisfactorily resolved by the Kokua Council.

The concluding 30 pages also set forth a dress and grooming code, plus additional topics including ''house rules,'' a statement of management rights, treatment of the subject of safety (under which heading a no-solicitation rule was written), and over a page devoted to ''A Word About Unions.'' Here the earlier-released position statement on the subject was paraphrased as to introductory language; then a more reproaching, underlined passage followed, before concluding with a repeat of the position statement's final three paragraphs as adjusted only grammatically and by other slight revision. The phraseology that exceeded language of the released position statement was:

> We do not believe that it is necessary for our employees to pay dues or fees to outside union organizers to receive wages and benefits comparable to what our competitors pay to their employees. We do not believe that outside union organizers can provide greater job security because our jobs depend on how well we do our work and how well we compete in our industry, not on unions. We believe that we can solve our problems by working together directly and not having to work through an outside union organization that does not work here with us. It is our policy that under no circumstances will our employees be forced by Hotel management to join or pay dues to any third-party/bargaining agent as a condition of employment. Nor will we provide better or worse treatment to anyone because of his support for a union.

When the employee handbook was distributed shortly before the election in its final form, it was much the same as the draft. This distribution was principally done over the 3 days of April 18–20. A small number of employees were not available during this timespan, resulting in distribution to them the following week.

However a 10th holiday termed ''employee floating holiday'' was added, and the problem solving cooperative was renamed ''The Employee Council.'' The house rules, infraction of which was associated to progressive discipline in both versions, were extensively rearranged and revised. The stated management rights and no-solicitation rule were repeated identically, while the ''Word About Unions'' disappeared from this final version.

DeFries testified that the 10th holiday was based on two factors. The first was as asserted intention of the Employer to be consistent with a floating holiday (as among 10 overall) policy utilized by Landmark Suites, another, and earlier existing, mainland-based development entity of Sweeney. Secondly, the floating holiday eliminated an inconsistency found between holiday subject treatment in the original draft employee handbook, and the terms of employment offer letters made to prospective managers back before the resort opened.

As to mechanics of the change, DeFries testified that this second factor in particular led to inquiries from employees about the inconsistency. From this impetus, and occurring around late February or early March, employees balloted among the three additional holiday options of Good Friday, May Day (May 1), or a floating holiday. The favored choice was for a floating holiday. DeFries believed this result was

made known to employees by managers soon following the vote; the change to be effective in early May.

As 1989, began the resort's food and beverage function was managed by Executive Chef Steve Amaral, while the main Maui Rose dining room was run by subordinate Philippe Periou. Less formal eating and drinking facilities also existed as the separate Ohana Grill and the Ohana Bar. The beverage manager for the resort was Todd Teske, a self-described equal to Periou on the supervisory plane.[5] Roland Rana Linmark was a month into employment as special projects manager, while the hotel's first director of housekeeping was Carla Rogers, assisted in this function by Janette Paguyo. Linmark had 20 years' experience in the Hawaii resort business, and the emphasis of his special projects responsibility was to assure that satisfactory housekeeping services would be provided. His deployment was also specifically influenced by possession of ''bi-lingual skills,'' termed in this record as ''Filipino.'' A technical hallmark of operations was the existence of a yet separate entity named Lotus Restaurants, Inc., which submanaged the food and beverage department. Employees of this department were on a payroll of this entity, in contrast with housekeeping where employees were on the basic Lotus Suites, Inc. payroll.

2. As to Objection I

Covert testified that she was hired December 5 as a cocktail waitress, and variously assigned to both the Ohana Bar and the Maui Rose Bar. She was supervised by Teske, and paid an initial hourly rate of $4.50. Covert testified that on either April 18 or 19, she had a conversation with Teske at the premises without others being in earshot. According to Covert, Teske first expressed his concern that she was getting too ''wrapped up in this union thing.''[6] When she dodged making any particular reply to this, Teske assertedly continued by saying that ''things'' would not get any better if the Union were to prevail. He continued by quoting Szafranski that no changes would be made to the hotel structure so as to provide an employee locker room or showers. Finally, Covert recalled Teske saying he had seen a confidential memo from Szafranski to DeFries stating that if the Union lost the election there would be a 7-percent pay raise for the rank-and-file; otherwise none. Teske concedes he once saw a confidential memo on Szafranski's desk, but cannot remember its contents nor recall whether he discussed it with Covert.

Florentina Crider was hired December 10, as a suite attendant in the housekeeping department. She testified that on April 7, at a loading dock where about 20 other employees were also present, Linmark responded to questions by saying, ''If you vote union, no raise'' and that the Union was holding up a raise for employees. Linmark denied making a statement of the quoted nature.[7]

3. As to Objection II

Crider also testified to being told by Rogers that her initial hourly pay rate of $7.49 would be increased after 30 days. This did not, however, materialize. The period of January into April was one of increasing agitation regarding a pay raise, fueled in large measure by the exchange of flyers between unions while Local 5 was still in the competition.

Employer did disseminate a memorandum to all employees dated April 11. It read:

> Several people have asked why the Company is not granting wage increases now. We have asked our legal counsel for advice on this, and we have been advised that we are in a critical period under the rules of the NLRB. Unless the specific amount of an increase was previously announced—before the Union's petition, or was established by prior years' practices, any adjustment affecting large number of employees would be considered a ''bribe'' to buy your vote. This, in turn, would mean that the Union could demand a rerun election if a majority votes ''NO,'' and we would have to go through this all over again.
>
> We are confident that a majority of our employees will recognize that they will be better off overall without a union. Once the election is over and the NLRB rules allow us to act without fear of legal complications, our policy will be the same as it is now—to pay competitive and fair wages and benefits.
>
> We hope you now understand one more reason why we are trying to convince the NLRB that union organizing should be deferred for several months when a new business opens. The current ground rules are not necessarily the best for the employees.
>
> Hope you understand—be patient, don't worry, be happy!!!

4. As to Objection III

This objection is first supported by Covert's comparison of the employee handbook from its draft to final version. She testified that in the revision process: (1) overtime pay after 8 hours' work in a day was added, (2) vacation entitlement was liberalized, (3) the 10th holiday was added, and (4) the Employee Council was ''solidified.''

A second branch of this objection is the uncontradicted fact that the Employer distributed a Christmas and New Year's bonus, plus the availability of a one-time complimentary room weekend on an ''as available'' basis and only if used by June 30 (extended into September).

Another objected-to grant is an ''Employee of the Month'' program in the housekeeping department. Written description of this program, as made by Rogers in a memorandum dated February 21, invited the placing of nominations in a suggestion box. Three such awards were made in the months preceding the election. The individual chosen (by fellow em-

[5] An employment confirmation letter to Teske dated November 19 referred to an entitled ''one floating holiday,'' in addition to the basic nine holidays incorporated by reference as the policy of Lotus Suites.

[6] During conversation with Teske the day before, Covert inadvertently displayed a note she had made at an earlier time. This note-taking followed discussion with a coworker about what that coworker had been asked relative to the Union. Covert had intended only to display a similar-sized paper to Teske, on which her preferred days off were written.

[7] Crider also recalled that on April 19, an unidentified person passed by a group of about 20 employees gathered in a locker and timecard area. She testified that this person said a pay raise would follow only if the Union lost the imminent election.

ployees) for April was Crider. Her award was $50 cash and a salad bowl.

The relative seniority standing of employees, and particularly the many hired together on dates in early December, was settled by a random ''pulling'' of numbers. This occurred on April 19. However, Linmark was aware of a general desire among employees to resolve this as far back as January, and he repeatedly promised to ''look into it'' as the months passed.

The subject composed itself when an undated notice issued from Rogers, inferentially in point of time just before occurrence of an announced departmental meeting of housekeeping and laundry employees. The notice advised such employees that a ''very exciting meeting'' had been scheduled for April 19. The stated agenda for this meeting included a ''departmental seniority draw.''

The pulling was a two-part procedure when done. Employees first acquired a number as among all others hired on the same date, and this number determined the order of drawing again for actual departmental seniority standing. Once this random result obtained, the seniority applied to both work stations and choice of days off.

This objection also broadly and constructively contends that hourly rate changes experienced by food and beverage department employees early in their employment were improper. Here Disher's testimony is that she was increased in her December pay rate of $4.60 per hour to approximately $7.45 as an occurrence in January. According to Disher this change was upsetting to employees and unexplained by management. An earlier temporary shortage was soon made up by a check that ''subsidize[d]'' the difference. Thus the disparity between her original rate, and the enhanced hourly rate, was cured as with shorted pay. Then when January ended Disher's rate was again confusingly reduced to a basic $4 level, with tips available to her as further remuneration from employment. In Covert's case, she testified that an initially understand hourly pay rate $4.50 was retroactively adjusted to $7.45. The December-January payroll happenings are better exemplified by Covert's testimony than by Disher's. Specifically, the adjusting payroll check to Covert applies to the pay period ending January 15 and was in the amount of $155.75 when disbursed on January 20.

When questioned about initial pay practices for food and beverage department employees, DeFries testified that tipped employees were ''brought to a higher rate of pay temporarily'' and only through January, because of delay in completing all hotel facilities and the adverse business effects of inclement winter months weather. On the larger question of promised pay raises, DeFries denied that any promise, or even ''reference'' to a wage increase, had been made to employees to his knowledge.

The final discrete component of this objection relates to resolution of a perceived expectation among employees of having a 7-percent across-the-board wage increase. Here, the Union relies preliminarily on testimony of Covert as outlined in section III,C,2, above. In addition, Disher testified that during an on-premises conversation with Periou on April 24, he asked if she had voted for the ''right person'' as a prerequisite to imminent receipt of a 7-percent pay raise. Periou is also implicated in certain testimony of Lecomte, who recalled that he cast the matter as a ''surprise'' about to happen.

5. As to Objection IV

Covert testified that during orientation at the Lahaina Civic Center in December, the Kokua Council was described as a group to be elected by employees. What eventuated was an appointed group, the composition and the functioning of which was set forth in a memorandum to employees from DeFries dated April 19. It read:

> As Chairman of our Employee Council, I am pleased to announce the employee members who will be serving on the Council, for the next six months. . . . These fellow employees were invited to participate following the employee meetings conducted by Chubby Mahoe, Rana Linmark and myself.
>
> [15 names omitted]
>
> The responsibilities of the Council include:
>
> 1. *Representation*: On Page 28 of our employee handbook, the Council serves as a center for employee appeals and in solving problems.
>
> 2. *Communications*: The Council will publish a monthly hotel newsletter.
>
> 3. The Council will plan all employee and family functions.
>
> 4. The Council will review new ideas submitted by our employees and submit recommendations to specific department heads and managers.
>
> 5. The Council will submit recommendations and suggestions for improvement to the General Manager.
>
> 6. The General Manager has the option of presenting any hotel policy or procedures changes to the Council, to get initial feedback and subsequent input.
>
> 7. The Council is dedicated to improving the human relationships in this hotel:
>
> Employee to Employee
> Manager to Manager
> Employee to Manager
>
> In closing, let me say that I am honored to serve as Chairman of Our Employee Council. Further, I appreciate Mr. Sweeney's consent which allows me to serve as Chairman for a minimum of one year. The Council will meet at least once every two weeks and all of our employees will be kept fully informed of our progress.

6. As to Objection V

Covert testified that the Union conducted an ''open house'' meeting at the Mahana Hotel on April 19. Mahana Hotel adjoins the Employer's facility with its address at 110 Kaanapali Shores Drive. She attended a portion of this meeting as held in a guest room. On her way out for the start of a shift, she ran across Crider, who said she understood the meeting had been canceled. Covert corrected this misconception and Crider appeared to proceed into the meeting.

Crider herself testified that approximately the next day Linmark made a statement to a group of employees in the cafeteria, asking if they had heard about the Mahana Hotel meeting being canceled. Crider recalled that no one of the group she was with made any comment on his statement.

The Union had disseminated postcards on April 18 as a ''FLASH'' item of preelection propaganda, claiming that

management had sought to have the room canceled for its Mahana Hotel meeting. This activity associates to Covert's testimony that a fire code restriction had, in fact, caused the room actually used for the Mahana Hotel meeting to be changed.

7. As to Objection X

The facts in support of this objection are the same as those relied upon relative to section 5. above in relation to the Kokua Council. However, Petitioner preserved an argument that maintenance of a suggestion box was objectionable. (Tr. 398–399.)

D. *Credibility*

1. Subject areas requiring credibility resolutions

While there are several fundamental and technical issues to the case, the necessary credibility resolutions may be narrowly drawn. They essentially constitute the Covert-Teske discussion, the asserted Periou episodes as testified about by both Lecomte and Disher, and the attribution of Linmark making unlawful implications and impressions. Additionally, comment is added relative to DeFries, because of the substantial testimony offered by this individual on practically all subject matters of the case.

2. Assessment of witnesses

a. *John DeFries*

The testimony of this individual was not contradicted in any direct manner; however, I add an express credibility assessment that from the standpoint of internal consistency and apparent probability, coupled with completely favorable characteristics of demeanor, I am persuaded that his testimony is fully reliable and constitutes the one chief source for a finding of general case context.

An effective contradiction of his sweeping ''insider'' knowledge concerning business matters would not really be expected. Beyond this, however, I deliberately extend singular credibility approval to DeFries' testimony. In practically all aspects of its wide ranging coverage, as happening on 3 different days during the overall hearing, his testimony was impressively unhesitating, persuasively stated, and overlain with every appearance of candid veracity.

I am aware, and have considered, that General Counsel contends how suspect disparity crept into DeFries' testimony over the days. (Tr. 863.) I simply disagree that such is a valid observation, and relegate any variances by DeFries in detail, emphasis, or new recollection to the ordinary frailties of human memory; and here, as to him, not in any appreciable way an avenue by which his overview, or his particulars, should be discredited.

Accordingly, DeFries' several subject matter versions are accepted as truth on issues such as (1) how, when, and why a 7-percent pay increase was established, and (2) general operating policy of the Sweeney enterprises, with special reference to employee holiday entitlement, plus his collateral description of innocuous events at an immediate postelection picnic hosted by the Employer for all employees.

b. *Cyrille Lecomte*

This individual presented in highly questionable fashion. His testimony was uncertain at best, and ''convenient'' at worst. I seriously doubt that he spoke from true knowledge of pertinent facts, and thus fully discredit his testimony.

c. *Mireya Disher*

This individual demonstrated a snide regard for her role in the evidence-taking process. She lacked a serious, positive intention to be accurate, and did not impress me as possessing, or even respecting, the truth about matters experienced. I fully discredit her testimony.

d. *Florentina Crider*

This individual was persuasively sincere appearing, and displayed a satisfactory ability to accurately recall useful facts. She exhibited an excellent demeanor while testifying, and I am fully persuaded to credit her in a substantial regard.

e. *Todd Teske*

This individual testified grudgingly, and in such palpable discomfort that I cannot believe his various assertions. I am convinced he was withholding a candid description of happenings in which he participated, and for this reason I discredit him in all significant regard.

f. *Philippe Periou*

This individual was candid seeming, and of apparent intent to speak honestly. On general demeanor grounds I give full credence to his testimony.

g. *Janette Paguyo*

This individual had an extremely poor memory, and a peculiar paralysis of response to questioning such that I fully doubt her ability to testify effectively. Notably she could not recall even if a pay raise occurred, or even *whether* she had attended any immediate post election, employer-sponsored picnic. I have no basis to accept any of her halting testimony, and thus discredit her in full.

h. *Rana Linmark*

This individual testified with an unusual style, and seemed to elevate an ability at engaging in disarming remarks over a true effort directed toward accurate recollections. I generally discredit his testimony, and particularly so the denial of having spoken in the manner attributed to him by Crider.

i. *Rebecca Covert*

This individual was precise, assured, thorough, possessed of a unique ability at making subtle distinctions and generally impressed as being of superior veracity. I credit her testimony in full.

E. *Holdings*

1. Introduction

In briefing this case, the Union points at both to principal evidence relating to its several objections, and hearsay commentary (U. Br. pp. 9, 20, and 24). It also injects that the

Employer openly opposed collective bargaining for its employees from the inception (U. Br. p. 8).

The various instances of hearsay testimony were successfully objected to at times, and at other times were not objected to or the testimony was permitted for purposes other than the truth of matters asserted. I have no reason to give weight to any of the hearsay testimony that would otherwise serve as a basis for ruling on any objection turning on utterances of an employer agent. Thus, subject to credibility assessments, all conduct addressed by the surviving objections which involves verbalisms is evaluated only in terms of nonhearsay evidence.

Further, the provisions of Section 8(c) of the Act apply in normal fashion. The Charging Party intimates that Respondent's ''union free'' objective was perilous (U. Br. p. 8). Respondent expressly claimed the ''free speech'' import of Section 8(c) of the Act (Tr. 742). I make the point to emphasize that while various utterances and writings associated to Respondent are plainly, if not stridently, partisan, Section 8(c) does have constant and undifferentiated application throughout.

In the statements of union counsel, and his briefing of the case, the ''critical period'' was repeatedly raised. To fix this precise time span in relation to present proceedings I restate the controlling rule of *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961), in which the critical period for representation case purposes was revised by the Board to commence on the date of filing a petition, which here was December 6, and from that point extending to the election date of April 21.

A subtle issue of agency is present in the case, calling for its preliminary consideration. Teske and Linmark were both admitted by the Employer to be ''statutory supervisors'' during the critical period involved; a statement of record from counsel qualified by adding that the ''full scope'' of their authority was possessed only ''within certain limits'' (Tr. 20). The Employer further qualified its admission by adding that Teske and Linmark were not to be construed as agents of the Employer, or persons acting on its behalf. The General Counsel promptly stated a satisfaction with this admission, contending that it must be construed as meeting the definition set out in Section 2(11) of the Act respecting both persons.

Fundamentally, I decline to make extensive comment on what the Employer considered the effect of its limited admission to be. Every indication from the evidence is that, at least, both individuals exercise independent judgment grounded in their knowledge and experience within the industry, while assigning employees to daily, task-oriented duties and to longer range utilization patterns. Teske was considered ''boss'' of the beverage department, trained hotel staff in his own area of operations, was coached in avoidance of ''TIPS'' activity, and did not disclaim the premise of questions alluding to employees ''under him.'' As a secondary indicator, Teske was salaried along with both Periou and Amaral. Linmark had ''run of the [whole] hotel'' outside an estimated 30 percent of his time spent with housekeeping. He functioned uniquely as a communicator, while also ''training'' housekeeping employees. His role was authoritative in regard to frequent orientation sessions for hotel staff, as further exemplified here when he once orchestrated a seniority lottery. I find both Teske and Linmark to be supervisors within the meaning of Section 2(11) of the Act, and, as alleged in paragraph 5. of the complaint, resultantly agents of the Employer within the meaning of Section 2(13). See *Westinghouse Electric Corp*., 277 NLRB 136, 141–142 (1985); *Dorothy Shamrock Coal Co*., 279 NLRB 1298, 1299 (1986); and *Minnesota Boxed Meat*, 282 NLRB 1211–1214 (1987), and authorities cited there.

2. As to Objection I

Respondent argues that the remarks attributed to Teske and Linmark, even if true, are merely isolated utterances under the circumstances and, at best, de minimis. I first disagree with this evaluation regarding the statement of Teske to Covert on April 18 or 19. Teske is found from the proofs in this case to be a supervisor within meaning of the Act at the time in question. As such, any verbalisms he made in other than a totally joking manner would reasonably be taken as an expression of management intent. By speaking to Covert as he did, and conjuring up the specter of a high level, confidential memo to the effect that a 7-percent across-the-board pay increase for employees would apply only should the Union lose the election, a communication of great significance resulted. The significance is that it was apparently authoritative, and constituted the type of remark which would likely be passed around within the work force. It is immaterial that Covert herself was a ''plant'' in the bargaining unit.[8] Teske neither knew this, nor if he did would it make a difference, since the communication was uttered in a serious sense, and strictly within the context of employment matters as being discussed between the two. It might be argued that existing, overall expression of company position, both by more highly placed officials and in writing, would constitute a disavowal of Teske's conduct. This factor is not, however, sufficient under the circumstances, and therefore his remarks are attributable to the Employer. Cf. *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974). Nothing in the discussion or exchange of remarks gave reason to believe that Teske was expressing merely a personal opinion, as opposed to a statement attributed to innermost management. Cf. *Napili Shores Condominium Homeowners' Assn. v. NLRB*, 939 F.2d 717 (9th Cir. 1991), 91 C.D.O.S. 5712 (opinion filed July 18, 1991).

In regard to the episode with Linmark, as testified to by Crider, his utterance as established from the credited evidence was a straightforward threat that voting for the Union would directly endanger the openly discussed hopes for a general wage increase. In such circumstances his remarks, readily heard by at least several employees according to the testimony of Crider, constituted a type of direct threat that further establishes merit to the Union's Objection I. See *Frank's Nursery & Crafts*, 297 NLRB 781 (1990).[9] I shall recommend sustaining Objection I on collective grounds of these two utterances.

The Union argues that inquiry by management personnel as to whether Disher had previously worked at ILWU-rep-

[8] See *Oak Apparel*, 218 NLRB 701 (1975).

[9] The Objections in this case largely encompass, and are essentially coextensive with, the unfair labor practice allegations of the consolidated complaint. There will be independently stated findings and conclusions regarding these unfair labor practice allegations as set forth in par. 6 of the complaint. *Coplay Cement Co*., 292 NLRB 309 (1989).

resented hotels, and Teske's prediction as spoken to Covert that ''things'' would not improve with union representation, are both impermissible. But the inquiries regarding Disher's work background show no menace beyond interpersonal curiosity, and Teske's statement is vague and unfocused to the point of insignificance. Nor does his conjecture about whether employees would ultimately have locker facilities provide a valid basis for disturbing this election. I shall recommend overruling this component of Objection I.

3. As to Objection II

I first of all discount the testimony of Crider that Rogers had said she would receive a pay raise after 30 days. Evaluation of such a remark, although credited secondarily by reason of Rogers not being called as a witness, is affected by one major factor. That factor is that the Employer was in its absolute startup period, and I cannot give the remark attributed to Rogers ordinary meaning as a employment promise. It must be remembered that this entire winter period was one of constant and extensive bandying among employees concerning the matter of pay improvement, and Crider herself testified about this being heard as other employees speculated variously on the subject. Additionally, Covert testified that she belatedly heard scuttlebutt from several employees that managers had promised pay raises back in December, but she conceded having no personal knowledge of this having been done.

In *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964), the Supreme Court wrote:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. [Id. at 409.]

Under *Exchange Parts*, the burden of establishing a justifiable motive for announcing a change in benefits reposes in the employer. *Wintex Knitting Mills*, 216 NLRB 1058 (1975).

The more significant analysis begins with a passage from *American Mirror Co*., 269 NLRB 1091 (1984). Here the adopted language, as pertaining to this issue of the case, read as follows:

> The Board has examined the question of wage increase withholdings during and after the union organizational campaigns in a multitude of cases over the years. Numerous authorities can be generally cited bothfor and against the legitimacy of such withholdings. Thin and almost subtle distinctions are found in many of the cases. For example, the Board has held that it is the employer's legal duty to proceed as he would have done had the Union not been on the scene, but the Board has also held that it is not unlawful per se for an employer to deny wage increases during a union campaign, for otherwise it may be accused of attempting to influence employees to decide against being represented by the Union. To threaten employees with complete abrogation of increases has been held to be unlawful, and likewise in the case of withholding an already determined, announced, and scheduled wage increase. it [sic] also appears that the Board makes a distinction between an announced and scheduled increase, considering the same as an ''existing'' benefit, and a possible or expected increase but one not based on promise but upon increases in previous years where no specific date or amount could be set with any degree of certainty. [Id. at 1094.]

This case differs markedly from most within the ''multitude'' of cases on this point, for the chief and vital reason that this operation was only starting up. As such there was no background of benefits provided in a ''haphazard fashion'' nor any past practice at which to look. See *Village Thrift Store*, 272 NLRB 572 (1983).

Relatedly in *Uarco*, 169 NLRB 1153 (1968), that company deferred periodic pay increases with a detailed explanation that it was to avoid the impression of ''vote-buying.'' The Board concluded from all the circumstances that employees could not reasonably have concluded that such a postponement was intended to influence their decision on a question concerning representation for purposes of collective bargaining. Here the case is so much stronger because there is no pattern from history, nor substantial evidence that pay raises were actually formulated on any relevant timetable.

Thus an employer's grant of benefits during the course of union activity must be charted in a manner avoiding the perception that such grant is responsive to the union activity. The point was described in *Wm. T. Burnett & Co*., 273 NLRB 1084 (1984), as follows:

> An employer's legal duty in deciding whether to grant benefits while a representation case is pending is to determine that question precisely as he would if a union was not in the picture. If the employer would have granted the benefit because of economic circumstances unrelated to union organization, the grant of those benefits will not violate the Act. On the other hand, if the employer's course is altered by virtue of the union's presence, then the employer has violated the Act, and this is true whether he confers benefits because of the union or withholds them because of the union.

An earlier statement of this principle relative to wage increase issues was defined as turning on consideration of whether the action in question had been ''done in such a way'' as to intimate a reward or inducement relative to selection or rejection of a union as a collective-bargaining representative. *Century Moving & Storage*, 251 NLRB 671 (1980). Within such doctrine an employer could lawfully withhold action on a wage increase during a union campaign based on this desire to avoid the appearance of interference and the commission of an act which would be considered an unfair labor practice. *Great Atlantic & Pacific Tea Co*., 192 NLRB 645 (1971). Holdings such as the ones immediately above are in stark contrast to cases in which (1) pay raise expectations were plainly conditioned on the selection of a union, (2) an ''established wage increase policy'' was suspended without explaining, and in fact intending, to avoid any interference and appearance of interference with election processes, or (3) the obvious situation of serious and extensive unlawful activities commenced immediately after an organizing drive with a ''plethora of acts of interference, re-

straint, and coercion against employees.'' *General Telephone Directory Co*., 233 NLRB 422 (1977); *Smith & Smith Aircraft Co*., 264 NLRB 516 (1982); *Standard-Coosa-Thatcher*, 257 NLRB 304 (1981); and *Parma Industries*, 292 NLRB 90 (1988).

Applying the principles of the authorities above I conclude that Respondent has acted lawfully in the undramatic and consistent advice to employees that wage increases must be deferred until after the election. The course so ''chart[ed]'' was about as neutral as could be done under the circumstances, given the high undercurrent of rumoring and the extended period of time in which two unions were competing between themselves and heavily propagandizing many aspects of this new employment setting. According I find that Objection II, to the extent that it calls in question the withholding of wage increases by the Employer, is without merit. Cf. *Ketlaw Broadcasting Co*., 302 NLRB 381 (1991).

The credited statement of Rogers to Crider that she would receive a pay raise after 30 days was noted above. I except this evidence from the otherwise credited testimony of Crider. From what is known of Rogers, she was well oriented in the Employer's basic business plan, and I believe DeFries' highly convincing denial of any awareness that such had occurred invites the appropriate inference. I discredit Lecomte's testimony that a preelection enticement was voiced by Periou. I note that the Employer's memorandum of April 11 provided direct and timely response to the persistent cross-talk among employees about a pay raise, much of which had an origin in propaganda between the competing unions. The postelection remark attributed to Periou by suspect testimony of Disher, was fixed as occurring at a time outside the critical period for considering objectionable conduct that might affect an election. In sum, I shall recommend overruling Objection II.

4. As to Objection III

Here, there are several areas to consider. As to the final handbook benefits Covert did not advance a well-founded analysis of the respective language covering premium overtime pay after 8 hours per day. In considering the draft and final versions on the subject, a better understanding would be that the notion of overtime pay after 8 hours in a day was first inartfully or incompletely described; and made plain when the final handbook issued. I see nothing in this clarification, nor the varying of originally proposed vacation formulas and listed holidays, that forms an objectionable grant of benefits. The so-termed ''solidified'' Employee Council simply a renaming and belated creation of what amounted to the Employer's problem-solving tribunal, as it chose to term potential employee dissatisfaction.

As to holiday bonuses, these were satisfactorily explained by DeFries as a one-time waiver of otherwise punitive eligibility policy. The complimentary room program was also satisfactorily explained as a feature of the employee's job orientation.

The vacation, holiday, yearend bonuses, and room stay perquisites, given when the resort was in its fledgling days of operation, the employee of the month program, and the establishment of structured seniority rosters are instances of startup policy implementation by management and nothing more. This is particularly true of the seniority pull, where random results could just as easily have favored union supporters as those neutral on the subject, undecided, or opposed. The pay adjustments in the Maui Rose operation are not shown to be anything more than correction of payroll error or inadvertence. Finally, the 7-percent wage increase, when granted, occurred well after the election and could not have had an effect. I shall recommend overruling Objection III to this extent.

However, timing of these matters remains to be considered. The Union has preserved this point from the hearing, and expressly argued the ''well-timed conferral'' doctrine in its brief. As a general rule an employer deciding whether or not to grant benefits while a representation election is pending should decide the question ''as he would if a union were not in the picture.''

Great Atlantic & Pacific Tea Co., supra at 29 fn. 1. The related component of this rule is that if an employer's course of action is prompted by a union's presence, then a violation of the Act would arise from such conference. A grant (or promise) of benefits made during an organizational effort may be presumed unlawful, unless the employer can provide an explanation other than the organizational activity for the timing of such grant or announce of such benefits. *Village Thrift Store*, supra. The requirement in such an instance is for the employer to show by objective evidence that it would have made the grant or announced the benefits even had a union not been present. Here, the 7-percent pay raise, ultimately announced on May 3 and effective on May 16, was properly explained in terms of legitimate deferral during the critical period with a solid foundation in periodic and restrained advice to employees of the circumstances. DeFries is particularly convincing in this regard by his testimony that although not a direct participant in the pay setting decisions, he was an official sufficiently within high management circles that he that knew generally of the approach to be taken.

The situation can be well contrasted with *Mercury Industries*, 242 NLRB 90 (1979), in which an inference was warranted that wage increases granted during the pendency of objections were actually designed to erode union support among employees, in terms of the background and practice of wage increases by that employer at that workplace. This area of the law, and the distinctions that are involved, is also well illustrated in *Baker Brush Co*., 233 NLRB 561 (1977), in which a violation was found where that employer ''sought to disparage'' that union in the course of an organizing campaign in which it conveyed the impression that the actively organizing union ''stood in the way'' of a timely wage increase to employees. While Respondent here is accused of such conduct, the actual facts of the case do not bear that out. In truth, much of the controversy relating to blame for a pay increase not materializing prior to the election arose from the propaganda between competing unions and was in no way attributable to the Employer other than an isolated, unauthorized utterance by Supervisor Linmark.

A wage increase issue can turn on consideration of it being ''done in such a way'' as to intimate a reward or inducement relative to selection or rejection of a union as collective-bargaining representative. *Century Moving & Storage*, 251 NLRB 671 (1980). I consider that the Employer's way here was not an impermissible one.

The seniority pull is distinct from other miscellaneous areas embraced within this objection. I earlier observed that random nature of the seniority pull could have results just as

easily favoring adherents to the Union as those neutral on the subject, undecided, or opposed. However, this does not address why the pull was done only 2 days before the election.

I hold that the Employer has not satisfactorily justified its action in this regard. Notably Linmark testified here in satisfactorily credible manner on the specific point, that procedure for the pull was hastily cobbled together even as employees gathered for the adventure in chance. No logical, operational, or practical reason was advanced for dealing at that particular time with this long-unresolved matter of seniority standing among persons within a large and labor-intensive department.[10] Nor was there a satisfactory explanation for the announcement of the new floating holiday by the mechanism of a release of the final handbook scant days before the election. It was, after all, originally intended to be released back in January according to the cover memorandum over the draft, and only the lamest of excuses has been offered for the timing shown. This settling out of major terms and conditions of employment, such as basic seniority and coveted economic benefits, is too likely to have an untoward effect on employees about to vote on the question of union representation. As done here, the action reasonably affects employees in their right to a free choice, and thus is objectionable as claimed.

5. As to Objection IV

The concept, description, and activities of the Kokua or Employee Council is completely an instance of startup management prerogatives. I see nothing about this entity, its purpose or composition, which supports the literal objection to which it associates. I shall recommend overruling Objection IV.

6. As to Objection V

In *South Shore Hospital*, 229 NLRB 363, 364 (1977), the Board stated:

> The Board has held that a respondent does not create an impression of surveillance by merely stating that it is aware of a rumor pertaining to the union activities of its employees so long as there is no evidence indicating that the respondent could only have learned of the rumor through surveillance. *G. C. Murphy Company*, 217 NLRB 34, 36 (1975). Since a rumor is, by definition, talk or opinion widely disseminated with no discernible source, employees could not reasonably assume from a respondent's knowledge of such a rumor, without more, that their union activities had been placed under surveillance. Certainly Furgeson's comment revealed Respondent's anxiety over its feared unionization of the central service and distribution department, but such a communication to an employee by itself is not an unfair labor practice within the meaning of Act.
>
> Similarly, in an earlier *G. C. Murphy Co*. case, 216 NLRB 785, 792 (1975), the Board held that the respondent did not create an impression of surveillance by a supervisor's statement that he had ''heard'' that two employees were engaging in union activities. In that case, the Board found that it was reasonable to assume that the respondent had learned of the employees' union activities without having to seek such information, and that the statement itself did not suggest that the supervisor had solicited the information or had engaged in spying.

The essential rule of the case is:

> In determining whether a respondent created an impression of surveillance, the test applied by the Board is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance. See *Schrementi Bros., Inc*., 179 NLRB 853 (1969). *South Shore Hospital*, supra at 363.

Here, the statements at issue could just as easily be idle remarks as they could be requisite implication that employees were being deliberately watched as time passed from petition filing to the election. There was in fact no indication of actual surveillance, for the impression of which to be created, and mere badgering of employees is not actionable. The Board has expressly discussed these distinctions, and particularly those between actual and implied surveillance, with the latter being typically categorized as creation of the impression. See *Photo Drive Up*, 267 NLRB 329 (1983); *Snyder Tank Corp*, 177 NLRB 724 (1969). The distinctions involved are quite plain in a case such as *Video Tape Co*., 288 NLRB 646 (1989), where it was expressly found that the unlawful creation of the impression of surveillance was based on informing employees that they were being watched and union supporters in particular were being even ''more closely watched.'' *Video Tape*, supra at 646 fn. 2.

An impression of surveillance is created only when conduct is reasonably taken to mean that the union activities of employees are, have been, or likely will be, spied on. A passing conversational reference by Linmark to the Union's openly known about Mahana Hotel meeting is not the type of conduct establishing a presence of this doctrine. Cf. *Hamilton Avnet Electronics*, 240 NLRB 781 fn. 4 (1979). I shall recommend overruling Objection V.

7. As to Objection X

This objection completely merges into Objection IV as treated above. If an employer-sponsored tribunal is legally spurious, its function as a magnet for grievable dissatisfaction is also at issue. As I do not find the Employer (Kokua) Council an objectionable vehicle for employee complaints to management, I similarly do not find it as an instrument of improperly soliciting grievances. I shall recommend overruling Objection X. This conclusion also applies to availability of a suggestion box.

F. *Employer's Collateral Contentions*

1. Due-process issue

The Employer broadly objects to the nature and extent of the representation case procedure to date. Here, its contentions encompass all action regarding treatment of the Union's objections, and the question of whether in the course of this hearing it was adequately informed of the issues faced. The position was, at a timely point in the hearing, summarized orally by the Employer's counsel. (Tr. 669–703.)

[10] The Employer did not discuss this expressly stated component of Objection III in its brief.

In the course of its extensive briefing on the point, *Matthews v. Eldridge*, 424 U.S. 319 (1976), was cited for a fundamental argument that the Union was never required ''to clarify its position.'' (E. Br., p. 30.)[11] I quote (as corrected) the passage from *Matthews v. Eldridge* on which the Employer essentially bases its vigorous contention. This is:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

On due reflection about these teachings, and the Employer's argument in general, I am satisfied that a fair and adequate basis existed for it to be informed of allegedly objectionable conduct with respect to the election. The original objections have both been explicitly corrected and modified. (U. Exh. H: Tr. 709–711.) Additionally, union counsel was pressed to explain the essence of varius portions of the stated objections, in the context of nearly 3 days of hearing having passed and the Union having rested its presentation. (Tr. 692–716.) My ultimate belief in this regard is that the Employer has been provided full and sufficient assertions as to what the objections, in their totality, comprise. According, I reject the contention that due-process rights have not been afforded.

2. Question concerning representation (QCR) issue

On this subject the Employer relies primarily on *Star Tribune*, 295 NLRB 543 (1989), arguing that a valid showing of interest has not properly underpinned the case, because many individuals are presumed to have signed authorization cards for the Union prior to December 5 (or their particular date of hire).[12] In *Star Tribune* the Board achieved a major legal excursion through principles of public policy, legislative history and fundamental labor-management rationale in the application of Section 8(a)(5) as involving mandatory subjects of bargaining. The context was that of applicants, or preemployees, and on the facts of the case the Board required disclosure of relevant information to the labor organization involved.

I do not believe Star Tribune is controlling on the point about which the Employer seeks to prevail. More relevantly the showing of interest in support of Section 9 proceedings is not a litigable matter. *NLRB v. Metro-Truck Body*, 613 F.2d 746 (9th Cir. 1979), rehearing denied 613 F.2d 746 (1980), and cert. denied 104 LRRM 2551 (1980). See also *Big Y Foods, Inc*., 238 NLRB 855 (1978); cf. *Dart Container Corp*., 294 NLRB 798 (1989). This was also a matter argued in the basic hearing on the Union's petition, a point rejected by the Acting Regional Director with reliance on *Metro-Truck Body* and *Riviera Manor Nursing Home*, 200 NLRB 333 (1972). In *Riviera Manor* a supplemental decision by the Board found that employees who had signed authorization cards ''in anticipation of employment,'' although the situation was not straightforwardly that they were mere applicants. The point made was that ''arrangements had been made for their employment,'' and the variation was whether they were ''actually working'' by having commenced duties. The fact situation pertained to sisters, and a third person whose contested authorization card did not require the passing on that individual dispute by the Board.[13]

I note analogous cases in which unfair labor practice proceedings lead to findings that statutory rights were at stake even though a limited or special employment relationship was present. In *Crown Cork & Seal Co*., 255 NLRB 14 (1981), an 8(a)(1) violation was found where employment was denied to an applicant believed to be engaged in union activities or because of her personal relationship to those so engaged. Comparably, in *Daily Transit Mix Corp*., 238 NLRB 879 (1978), a statement in violation of the Act was made to the effect that applicants for employment, who were members of a certain labor organization, would not for that reason be hired.

On balance, I hold that principles established in *Star Tribune*, even noting their rootedness in *Pittsburgh Plate Glass v. NLRB*, 404 U.S. 157 (1971), do not control here. I believe, contrarily, that the paramount policy is that of authorizing highly discretionary administrative determination as to the adequacy and appropriateness of showings of interest, under whatever particular facts pertain. I thus conclude a viable question concerning representation exists here, and at all material times has existed.[14]

THE UNFAIR LABOR PRACTICES CASE

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Hawaii corporation with an office and place of business located at Lahaina, Island of Maui, Hawaii, where it has been engaged in the operation of a hotel and restaurant, providing food and lodging for guests. In the course and conduct of such business operations, it annually receives gross revenues in excess of $500,000 while purchasing products, goods, and materials valued in excess of

[11] *Matthews v. Eldridge* was a case decided in terms of the due-process clause of the fifth amendment in relation to proceedings under Title II of the Social Security Act, 42 U.S.C. par. 423. In that case, a divided Court held that an evidentiary hearing was not required under the facts.

[12] At the outset of the hearing, during off-the-record discussion, the Employer's counsel introduced the ''new enterprise bar'' concept as a position of his client. By this the Employer sought to be insulated from any representation petition for a 6-month period after commencing operations. This was an express item of the Employer's position statement, as furnished in writing to the Union in November. The concept had been ''raised'' in the Employer's request for review of the original Decision and Direction of Election (Tr. 690); exceptions that were briefly denied in a Board order stating ''no substantial issues warranting review'' had been raised. The point was not briefed, and I extend no further treatment to the ''new enterprise bar'' subject as appearing sporadically in this record.

[13] See *Copes-Vulcan, Inc*., 237 NLRB 1253, 1257 (1978).

[14] The content of Sec. 9(c)(1)(A)(i) of the Act is not a jurisdictional prerequisite to Board action; rather, it is an administrative expedient for determination of whether, generally, further proceedings are warranted. *Big Y Foods*, supra.

$50,000 received directly at its Maui facility from points located outside the State of Hawaii. On these admitted facts, I find that Respondent is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and, as is also admitted, that the Charging Party is a labor organization within the meaning of the Section 2(5).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary*

In consolidated unfair labor practice and representation proceeding cases it is well established that the standard of proof for violations of Section 8 is a higher one than what is required by the Board to show the breach of laboratory conditions in the conduct of its representation proceedings. This principle will be applied in the discussion that follows.

B. *As to Complaint Paragraph 6(a),(i)*

1. Evidence

This allegation is based on the testimony of Crider relative to utterances made by Linmark in early April 1989 as described above.

2. Holding

While the phraseology of the complaint alleges that statements of Linmark at issue ''implied'' the reason for prevention of a pay raise, I treat this as tantamount to a threat that one would not be granted should employees vote for the Union. These circumstances constitute the commission of an unfair labor practice because of the direct threat to employee rights that is involved. Accordingly, I find this component of the complaint to be adequately supported by proof.

C. *As to Complaint Paragraph 6(a),(ii)*

1. Evidence

This allegation is also based on the testimony of Crider relative to the utterance made by Linmark concerning a union open house at the Mahana Hotel.

2. Holding

The utterance at issue is an innocuous one, and does not give rise to a showing that the impression of surveillance of union activities was created.

D. *As to Complaint Paragraph 6(b),(i)*

1. Evidence

This component of the complaint is based on the discussion between Teske and Covert at the premises on either April 18 or 19.

2. Holding

I do not consider that Teske's statements, as found to have been made through the credited testimony of Covert, constitute the requisite implication that employees' union activities were under surveillance, as opposed to its threatening characteristic. See *Hamilton Avnet*, supra.

E. *As to Complaint Paragraph 6(b),(ii)*

1. Evidence

This component of the complaint relates to Teske's statement that locker facilities might not be provided by Respondent when its final construction of the hotel was complete.

2. Holding

There is no indication that this comment constituted a threat, as contrasted with an observation or personal opinion relative to the final finishing of the resort. Accordingly I do not find that the allegation of paragraph 6(b),(ii) has been supported by probative evidence.

F. *As to Complaint Paragraph 6(b),(iii)*

1. Evidence

This component of the complaint is again based on the credited evidence regarding Teske's remarks to Covert, and is the same episode as relating to Objection I.

2. Holding

In view of the finding that such a remark was made, and my belief that the alleged implication is tantamount to a threat, I conclude that paragraph 6(b),(iii) of the complaint has been supported by probative evidence.

G. *As to Complaint Paragraph 6(c)*

1. Evidence

The evidence pertaining to this component of the complaint is the same as that relating to the implemented pay raise as covered in Objection II.

2. Holding

On the same basis that I found that such objection was without merit, I supported by probative evidence.

H. *The 10(b) Issue*

Respondent contends that under *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), there is an insufficient factual resemblance, or nexus, between content of the charge and ''substantive allegations of the complaint.''

In *NLRB v. Fant Milling Co*., 360 U.S. 301, 308 (1959), the Supreme Court discussed the Board's authority to discharge its duty of protecting public rights, holding that the agency's broad investigatory powers of inquiry are not confined to ''precise particularizations of a charge.'' Consistent with *Fant Milling*, the Board has long required a sufficient factual relationship between specific allegations in the charge and resultant complaint allegations. See *Red Food Store*, 252 NLRB 116 (1980), and cases cited.

Redd-I, Inc., 290 NLRB 1115 (1988), held that in deciding whether a complaint is closely related to charge allegations, the Board would apply a closely related test comprised of the following factors. First, the Board would examine whether otherwise untimely allegations involve the same ''class,'' or legal theory, as allegations in the timely filed charge. Second, the Board would look at whether otherwise untimely al-

legations arise from the same factual situation or sequence of events as advanced in the pending timely charge. Finally, the Board may consider whether a respondent would raise the same or similar defenses to both allegations. This third criterion was explained as meaning that a reasonable respondent would preserve similar evidence and prepare a similar case in defending against the otherwise untimely allegations as would have been prepared and preserved in resisting basic and timely allegations of the pending charge. Id. at 1117.

Respondent contends here that none of the applicable factors defined in *Redd-I, Inc*. have been satisfied in the General Counsel's complaint. Further, it cites *G. W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988), to support its position. This recent court of appeals decision denied enforcement to *G. W. Galloway Co*., 281 NLRB 262 (1986), and in doing so involved two essential notions as law of the case. One was reiteration of the fundamental premise that Section 10(b) of the Act provides how an unfair labor practice charge defines and limits the scope of litigation brought by the Board. More specifically, *Galloway* also barred freewheeling expansion of 8(a)(1) grounded allegations in a complaint, stemming only from the catchall, boilerplate ''other acts'' language of the Board's preprinted charge form. In the later application of *Redd-I, Inc*., the Board in *Nickles Bakery* overruled past precedent tending to exempt 8(a)(1) complaint allegations from the traditionally ''closely related'' test, stating in part that it did so ''in light of'' the court's *Galloway* decision.

I believe that each prong of the *Redd-I, Inc*. test have been fulfilled. As a conceptual ''class,'' as part of the same sequence of events in a fractious organizational drive, and as presuming the same general legal approach to resisting the complaint, the necessary connections are all well shown. Further, the practicality of the situation militates against Respondent. A hearing on the objections had been long set, and the charge, as filed on August 11, was followed only 3 days later by an order from the Regional Director postponing the hearing indefinitely. Under these circumstances, it must be thought that Respondent was well and fully aware of matters in controversy.

During the hearing Respondent moved to dismiss this complaint on *Nickles Bakery* grounds (Tr. 718), and renewed the motion in its brief. (R. Br. p. 29.) The reservation of ruling is now lifted, and I deny this motion to dismiss.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and on the entire record, I make the following conclusions of law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by threatening to withhold a 7-percent general pay increase because of the Union.

4. The unfair labor practice described above is an unfair labor practice affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that Respondent engaged in a certain unfair labor practice, I shall recommend that it be ordered to cease and desist therefrom and to post a notice to employees for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act, and Respondent's obligation to remedy the unfair labor practice found above.

[Recommended Order omitted from publication.]